SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 30 1974

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1643

COLGATE W. DARDEN, III, *Petitioner,*

v.

ELIZABETH J. WITHAM; BLATT, FALES, PEEPLES, BEDINGFIELD & LOADHOLT; HENDERSON, SALLEY BODENHEIMER & LYNN; CLEO J. SCOTT, Clerk of the Court of Common Pleas for Aiken County, S.C.; HONORABLE J. B. NESS, Presiding Judge, Second Judicial Circuit; FRANCES SMITH, Clerk of the Supreme Court of South Carolina, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAY P. MCCLAIN
ARMAND DERFNER
4 Gillon Street
Charleston, S.C. 29401

FRANK ROBINSON, II
1717 Gervais Street
Columbia, S.C. 29401

RALPH C. ROBINSON, JR.
1306 Main Street
Columbia, S.C. 29401

Attorneys for Petitioner

Of Counsel:

EPSTEIN & MCCLAIN
LEWIS, LEWIS, ROBINSON & ARNOLD

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Citations to Opinions Below	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	5
(1) Abstention	7
(2) Three-Judge Court	10
Conclusion	12
Appendix A: Opinion of the United States District Court	1a
Appendix B: Opinion of the United States Court of Appeals	11a
Appendix C: Opinion of the Court of Common Pleas for Aiken County, South Carolina (July 15, 1971) (Order portion only)	12a
Appendix D: Opinion of the Court of Common Pleas for Aiken County, South Carolina (November 11, 1972) (First five paragraphs only)	13a

INDEX OF CITATIONS

Cases:

American Trial Lawyers Association, N. J. Branch v. New Jersey Supreme Court, 409 U.S. 467 (1973) 5, 7, 10, 12
Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 8
Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1, 4 (1961) 4
Devine Street Bookmart, Inc. v. Bourne, Civil No. 73-1124 (D.S.C.) April 8, 1974 10
Doe v. Bolton, 410 U.S. 179, 201 (1973) 8
Dombrowski v. Pfister, 380 U.S. 479 (1965) 8

Page

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 416 (1964) 7, 8
Ex Parte Poresky, 290 U.S. 30 (1933) 9
Frontiero v. Richardson, 411 U.S. 677 (1973) 6
Fuentes v. Shevin, 407 U.S. 67 (1922) 11
Goosby v. Osser, 409 U.S. 512, 521 (1973) 9, 12
Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962) 12
Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970) 11, 12
McNeese v. Board of Education, 373 U.S. 668 (1963) .. 8
Mitchum v. Foster, 407 U.S. 225 (1972) 8
Mitchum v. Foster, 315 F.Supp. 1387 (N.D.Fla. 1970), rev'd, 407 U.S. 225 (1972) 11
Mosher v. City of Phoenix, 287 U.S. 29 (1930) 9
Perez v. Ledesma, 401 U.S. 82, 103-4 (1971) 10
Reed v. Reed, 404 U.S. 71 (1971) 6
Roe v. Wade, 410 U.S. 113, 166 (1973) 8
Samuels v. Mackell, 401 U.S. 66 (1971) 8
Steffel v. Thompson, — U.S. —, 39 L.Ed.2d 505 (1974) 5, 8, 10, 12
Wiegand v. Wiegand, — Pa. Super. —, 42 L.W. 2183 (Sept. 19, 1973) 6
Zwickler v. Koota, 389 U.S. 241 (1967) 8

U.S. Constitution, Amendment XIV 3

Statutes:

South Carolina Code of Laws, Annotated, 1962, Section 20-112 ..... 3, 4
United States Code:
Title 28, Section 2281 3
Title 42, Section 1983 4

Supreme Court of the United States

OCTOBER TERM, 1973

No.

COLGATE W. DARDEN, III, *Petitioner,*

v.

ELIZABETH J. WITHAM; BLATT, FALES, PEEPLES, BEDINGFIELD & LOADHOLT; HENDERSON, SALLEY BODENHEIMER & LYNN; CLEO J. SCOTT, Clerk of the Court of Common Pleas for Aiken County, S.C.; HONORABLE J. B. NESS, Presiding Judge, Second Judicial Circuit; FRANCES SMITH, Clerk of the Supreme Court of South Carolina, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals in the above-entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of South Carolina, unreported, is printed in Appendix A, *infra,* p. 1a. The opinion of the United

States Court of Appeals for the Fourth Circuit, unreported, is printed in Appendix B, *infra*, p. 11a.

Relevant portions of the opinion of the Court of Common Pleas for Aiken County, South Carolina, July 15, 1971, unreported, are printed in Appendix C, *infra*, p. 12a. Relevant portions of the opinion of the Court of Common Pleas for Aiken County, November 11, 1972, unreported, are printed in Appendix D, *infra*, p. 13a.

QUESTIONS PRESENTED

Petitioner filed suit in federal district court challenging the constitutionality of a state statute authorizing divorce courts to award attorneys' fees to wives but not to husbands, and alleging that he had no state remedy because a state court had refused to consider his constitutional claim. The district court nonetheless dismissed the complaint outright and the court of appeals affirmed the dismissal. In these circumstances petitioner believes the following questions are presented:

(1) Where serious federal constitutional issues were raised and were not rebutted, and where the inadequacy of the state forum was specifically alleged, did the district court err in dismissing the complaint outright, rather than retaining jurisdiction pending the final outcome of state proceedings?

(2) Even if a district court has discretion to abstain pending state court proceedings where a serious constitutional challenge to a state statute is raised, can this discretion be exercised without convening a three-judge district court?

JURISDICTION

1. This action was filed January 24, 1973, in the United States District Court for the District of South Carolina. Jurisdiction was based on 28 U.S.C §§ 1331, 1343(3), and 1343(4) for relief pursuant to 42 U.S.C. §§ 1981 *et seq.*, 28 U.S.C. §§ 2201 and 2284, and the Fourteenth Amendment to the United States Constitution. The opinion of the district court dismissing the action was filed June 15, 1973.

2. The judgment of the United States Court of Appeals for the Fourth Circuit, affirming the district court, was entered on January 31, 1974.

3. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment Fourteen, provides in part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Carolina Code of Laws, Annotated, 1962, as amended, Section 20-112:

> In every action for divorce from the bonds of matrimony, the wife, whether she be plaintiff or defendant, may in her complaint or answer or by petition pray for the allowance to her of alimony and suit money and for the allowance of such alimony and suit money pendente lite. If such claim shall appear well founded the Court shall allow a reasonable sum therefore.

United States Code, Title 28, Section 2281:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting

under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming the district court's dismissal of petitioner's complaint for failure to state a claim upon which relief can be granted. Petitioner's complaint, brought pursuant to 42 U.S.C. § 1983, challenges the constitutionality of Section 20-112 of the South Carolina Code of Laws, 1962, as amended, which provides in pertinent part: "In every action for divorce from the bonds of matrimony, the wife . . . may . . . pray for the allowance to her of . . . suit money . . . If such claim shall appear well founded the Court shall allow a reasonable sum therefor." Under South Carolina law, the right of a litigant to recover attorneys' fees exists solely when provided by statute, *Collins* v. *Collins,* 239 S.C. 170, 122 S.E.2d 1, 4 (1961), so that the above statute has the effect of authorizing attorneys' fees to wives but not to husbands.

The instant case originated when a state court awarded attorneys' fees to respondents on the sole authority of the above statute. Petitioner sought to challenge the constitutionality of this statute in the state court, but the state court refused to consider the claim. At that point, petitioner filed this case in district court. He alleged that the statute is unconstitutional, on its face and as applied to him, because it invidiously discriminates on the basis of sex, and because it denied

due process of law by failing to inquire whether his former wife had need of an award of attorney's fees. He sought a declaratory judgment and injunctive relief to prohibit the enforcement of the aforesaid statute against him by his former wife, the attorneys for his former wife, clerks of court, and a judge who had issued an order to enforce the statute against him.

Respondents moved to dismiss the action on the chief grounds that the same issue was presented in a pending state court proceeding between the same parties. The district court dismissed the complaint, holding, first, that this was simply a domestic case not properly in the federal court at all, and, second, that comity required it to leave the matter to the state courts. In a brief per curiam opinion, the court of appeals affirmed the district court's analysis that comity required dismissal of the action simply because the same issues had been argued to the state courts in a pending civil action. Although respondents had urged, in the state court, three separate procedural grounds why the state court should not rule on the merits of the constitutional claim presented, respondents were allowed to prevail in the courts below on the theory that the state court would in fact rule on the merits of the issue.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and reverse the judgment below because that judgment is in square conflict with two recent decisions of this Court: (1) *American Trial Lawyers Association, N. J. Branch* v. *New Jersey Supreme Court*, 409 U.S. 467 (1973), and (2) *Steffel* v. *Thompson*, — U.S. —, 39 L.Ed.2d 505 (1974). Petitioner believes it is clear that on the merits his complaint raised substantial federal constitutional ques-

tions which called for serious adjudication by a three-judge district court. Petitioner believes it is equally clear that if the pendency of a state proceeding called for the district court to exercise discretion to abstain, that decision could be made only by a three-judge court and such court was required to retain jurisdiction to await the outcome of the state proceeding.

The district court saw this case as one in which federal jurisdiction was wholly lacking, *infra* p. 8a;

> This is not a federal court case. It is a domestic case and all the window dressing cannot change the true nature of the action.

This was fundamental error, for the constitutional challenges to this statute which have been raised by petitioner are substantial. This court has itself held unconstitutional statutes which make flat sex distinctions based solely on custom. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). The statute in question here is of precisely the same sort, since it authorizes the award of attorneys' fees to wives in domestic cases, without regard to their need or other circumstances, but not husbands, no matter what the circumstances. A statute of this sort has been held unconstitutional by the only court which has reviewed it. *Wiegand* v. *Wiegand*, — Pa. Super. —, 42 L.W. 2183 (Sept. 19, 1973). Thus it is clear that, whatever the procedural issues touching the relationship between federal and state courts, this case on the merits is a traditional civil rights case coming squarely within the function of the federal courts, and the district court erred in holding that petitioner's challenge to its constitutionality failed to state a federal claim.

The court of appeals preferred to rest dismissal on the district court's alternate ground of comity. But if this is a case in which the federal court should have abstained on grounds of comity, there are certain clearly defined guidelines for such cases, which were flatly ignored in this case. Those guidelines make it clear that (1) if abstention were called for, the district court must retain jurisdiction so as to insure its ability to guarantee federal rights if the conclusion of the state proceedings left those federal rights unprotected or not considered, and (2) that the decision to abstain itself, like all other decisions requiring the exercise of discretion in a case raising serious federal questions which might lead a federal court to enjoin enforcement of a state statute, must be made only after a three-judge court has been convened.

(1) Abstention

In *American Trial Lawyers Assn.* v. *New Jersey Supreme Court, supra,* a district court dismissed a complaint that alleged that state court rules restricting attorneys' fees were unconstitutional. The three-judge district court abstained, and refused to retain jurisdiction or specify that the dismissal of the action was without prejudice. On appeal to this court, appellants attacked only the dismissal, and this court held that when a district court abstains in order to defer decision to a state court forum, "the proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts." 409 U.S. at 469. The Court quoted the earlier decision in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 416 (1964), to the effect that "abstention 'does not, of course, involve the abdication of federal jurisdiction,

but only the postponement of its exercise.' " *England* had made clear that in an action where a federal court initially abstains, the federal plaintiff is not limited to the "inadequate substitute" of review of a state court judgment by appeal in this Court: "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts." *Id.* at 417.

These cases form parts of the careful pathway this Court has picked in recent years in defining the relationship between federal and state courts. *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Atlantic Coast Line R.Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Mitchum* v. *Foster*, 407 U.S. 225 (1972). *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 201 (1973); *Steffel* v. *Thompson*, *supra*. While this Court has always admonished federal courts to allow room and time for the state courts to decide questions properly brought before them, this Court has likewise made it clear at all times that the federal courts sit to provide ultimate protection for federal rights on those occasions when state courts will not. The underlying assumption of these cases is the belief that state courts will provide adequate remedies for federal rights, but the federal courts are ordered to remain available to test that underlying assumption and to provide relief upon a showing that it has proved unwarranted.

In this case, in addition to the general principles calling for retention of jurisdiction, several factors

make the need more pointed. First, there is a specific allegation in the complaint that the state courts will not provide an adequate forum, and that allegation is supported by the objective fact that the state trial court refused even to consider the constitutional argument.[1] Second, there is a pressing need to resolve the constitutional questions since there have been repeated conflicts in the past between these parties over the application of the statute in question. That need is magnified by the sheer enormity of the sum of $175,000.00 in attorneys' fees awarded against the petitioner, which has a chilling effect on his right to litigate or defend against litigation based on legitimate disputes with his former wife as to the proper construction of their marital settlement agreement.

This petition does not seek an order by a federal court interrupting a state court proceeding. Petitioner is satisfied to allow the state court proceeding to go to termination if a competent forum (a three-judge court) determines that it should. What petitioner does seek is the right to return to federal court, expeditiously and without complication, if petitioner's prediction of the inadequacy of the state remedy is

---

[1] The court of appeals assumed, contrary to this allegation, that the state court would adjudicate the merits of the constitutional claim. Since the allegations of the complaint must be accepted as true on a motion to dismiss, this is a further reason that dismissal was erroneous. *Goosby* v. *Osser*, 409 U.S. 512, 521 N.7 (1973); *Ex parte Poresky*, 290 U.S. 30 (1933); *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1930). Petitioner would note that the South Carolina Supreme Court heard oral argument almost exactly one year ago, and has not yet rendered an opinion; this period of delay is wholly unprecedented for the South Carolina Supreme Court, which renders virtually all its decisions no more than three months after argument.

proved.[2] Cf. *Perez* v. *Ledesma*, 401 U.S. 82, 103-4 (1971) (Brennan, J., concurring and dissenting).

(2) Three-Judge Court

In *Steffel* v. *Thompson*, 39 L.Ed.2d 505 (1974), this Court reiterated the well-settled principle that when a three-judge court is sought in an action requesting injunctive relief against the enforcement of a state statute, the three-judge court must be convened to make *any* decision on the merits of the case, unless the constitutional question presented is patently insubstantial:

> "Since the complaint had originally sought to enjoin enforcement of the state statute on grounds of unconstitutionality, a three-judge district court should have been convened. See 28 U.S.C. § 2281; *Goosby* v. *Osser*, 409 U.S. 512 (1973); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). A three-judge court is required even if the constitutional attack—as here—is upon the statute as applied, see *Department of Employment* v. *United States*, 385 U.S. 355 (1966); *Query* v.

[2] The *American Trial Lawyers* case might be interpreted to allow a federal court to dismiss an action when abstaining if the dismissal is clearly without prejudice. In this case, the district court was plainly of the opinion that this action should not be heard in federal court, and the court of appeals affirmed the dismissal without modification. In cases such as this one, which present issues of pending state court proceedings and multiple state court proceedings, it is imperative that jurisdiction be retained. Otherwise, the courts may be confronted with unnecessarily complicated issues of res judicata, and the federal plaintiff may be faced with state court proceedings, instituted after the dismissal of the federal action, which are pending when he seeks to refile the federal action. "The portal of the federal court should not be a revolving door through which litigants may never gain entrance for the adjudication of claims of deprivation of federal rights." *Devine Street Bookmart, Inc.* v. *Bourne*, Civil No. 73-1124 (D.S.C. April 8, 1974), slip opinion at 8.

United States, 316 U.S. 486 (1942); *Ex parte Bransford,* 310 U.S. 354, 361 (1940); see generally Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37-50 (1964); and is normally required even if the decision is to dismiss under *Younger-Samuels* principles, since an exercise of discretion will usually be necessary, see *Jones* v. *Wade,* 479 F.2d 1176, 1180 (1973); *Abele* v. *Markle,* 452 F.2d 1121, 1125 (1971); see generally Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 309 (1963)." *Id.* at 513 n.7.

The substantial nature of the constitutional question presented has never been questioned by respondents or the courts below.[3]

The courts below failed to apply this well-settled doctrine because they erroneously relied upon the doctrine of *Maryland Citizens for a Representative General Assembly* v. *Governor of Maryland,* 429 F.2d 606 (4th Cir. 1970). In that case, Judge Haynsworth wrote that a single district judge is empowered to evaluate whether a complaint that seeks the convening of a three-judge court presents a claim that is insubstantial "because injunctive relief is otherwise unavailable." Id.

---

[3] The District Court suggested that the state court officials were joined only as nominal parties. However, the joinder of these officials as parties defendant was no more nominal than the joinder as defendants of magistrates and other court officials in the cases heard by three-judge courts on the constitutionality of replevin statutes, *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), or the joinder of the state court judge who issued a preliminary order in another case heard by a three-judge court, *Mitchum* v. *Foster,* 315 F.Supp. 1387 (N.D. Fla. 1970), *rev'd,* 407 U.S. 225 (1972). A state official who has issued an order against the plaintiff pursuant to the challenged statute is a necessary party, not a nominal party.

at 611. This Court has never held that a single district judge is authorized to examine the merits of the complaint to determine whether the complaint establishes sufficient basis for equitable relief, *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); cf. *Goosby* v. *Osser, supra,* at 521. Therefore the very notion of a single judge inquiring into the availability of equitable relief is at odds with the settled doctrine of this Court's opinions.[4] Even if the principle might occasionally be invoked where the claim for equitable relief is patently frivolous, the application of any such principle to the facts of this case, alleging an inadequate state forum, repeated application of the statute, and a chilling effect on petitioner's access to the state courts, is clearly "an exercise of discretion" which this Court requires be done by a three-judge court, even in evaluating a decision to abstain under *Younger-Samuels* principles, *Steffel* v. *Thompson, supra.*

CONCLUSION

Petitioner suggests that this is a particularly appropriate case for granting certiorari. (1) The issues of the jurisdiction and procedures of three-judge courts are important. (2) The conflict with *American Trial Lawyers Association* v. *New Jersey Supreme Court,* and with *Steffel* v. *Thompson,* is clear. Petitioner would further suggest that the issues are so plain that this case should be summarily reversed, without the necessity of further argument on the merits.

---

[4] In the *Maryland Citizens* case, the district judge had weighed the equities involved in hearing a legislative reapportionment suit filed several weeks before the regularly scheduled primary qualifying date and many months before the general election, and dismissed the complaint.

For the foregoing reasons, the writ of certiorari should be granted, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and this cause should be remanded with instructions that a three-judge court should be convened to consider the question of abstention, and should—if it abstains—retain jurisdiction pending the disposition of issues in the state proceeding.

Respectfully submitted,

RAY P. MCCLAIN
ARMAND DERFNER
4 Gillon Street
Charleston, S.C. 29401

FRANK ROBINSON, II
1717 Gervais Street
Columbia, S.C. 29401

RALPH C. ROBINSON, JR.
1306 Main Street
Columbia, S.C. 29401

Attorneys for Petitioner

Of Counsel:

EPSTEIN & MCCLAIN
LEWIS, LEWIS, ROBINSON & ARNOLD